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No. 04-108

Supreme Court, U.S.
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In The
Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In its opposition to the petition, Respondents to a large extent argue the merits of the legal dispute rather than presenting reasons why the petition should not be granted. As directed by this Court's rules, we will not re-argue the substance of our case. Moreover, in their opposition, Respondents do not really contest that this case presents a federal constitutional issue of vital public importance that affects thousands of property owners throughout the country, which, in and of itself is a reason to grant certiorari. Nor do Respondents contest that the instant case, unlike other recent petitions on the public use issue, presents a clear legal dispute, without factual complications or procedural difficulties, that lends itself to resolution by this Court.

Instead, Respondents contend that this Court's decisions in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), control the outcome of this case. Brief in Opposition of City of New London and New London Development Corporation [hereinafter Brf. in Opp.] at 10-17. They also claim that a conflict on the issue of the use of eminent domain for private development largely does not exist. *Id.* at 18-24. Both of these erroneous contentions are addressed below.

1. Respondents incorrectly claim that this Court's decisions in *Berman* and *Midkiff* control the outcome of this case and are so on point that this Court does not need to hear the instant matter. As set forth in the petition, *Berman* addressed the use of eminent domain to clear slums and blighted areas while *Midkiff* addressed the ability of Hawaii to alleviate oligopolistic land holdings.

This Court has never addressed the issue of whether eminent domain can be used simply for the purpose of increasing tax revenues and improving the local economy of a city. *See* Petition for Certiorari [hereinafter Petition] at 23-24; *see also* Brief *Amicus Curiae* of the Property Rights Foundation of America at 5-8 (arguing *Berman* and *Midkiff* do not control the instant case).

Moreover, the unfettered use of eminent domain for economic development would not be an application of the principles set forth in *Berman* and *Midkiff* but would rather constitute a vast expansion of eminent domain authority. While substantial deference should be given to legislative determinations of public use, as this Court pointed out in *Midkiff*, 467 U.S. at 45, "a purely private taking could not withstand the scrutiny of the public use requirement." Accordingly, the definition of public use must allow the judicial identification of private uses. Moreover, pursuant to *Berman* and *Midkiff*, and as acknowledged by Respondents, not only must takings serve a valid public use, the means chosen by the government must rationally effectuate that use. Brf. in Opp. at 10.

This case will determine whether these requirements place any meaningful limits on eminent domain authority under the Fifth Amendment. As pointed out in the petition, acceptance of economic development as a public use, and adoption of the largely subjective "purposive" test set forth by the majority of the Connecticut Supreme Court, makes it virtually impossible, contrary to *Midkiff*, to identify a private use. *See* Petition at 25-29.

In their opposition brief, Respondents claim that the Connecticut Supreme Court's decision below does not

completely negate the public use requirement of the U.S. Constitution. In support of their contention, Respondents cite to three Connecticut cases that supposedly demonstrate a robust public use requirement but in fact do not address public use at all. *See* Brf. in Opp. at 16-17. First, they cite to two cases that were decided on purely statutory grounds. *Aposporos v. Urban Redevelopment Commission*, 790 A.2d 1167, 1177-78 (Conn. 2002); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1186-87 (Conn. 2002). Neither indicates any vitality to the constitutional public use requirement on takings; they simply hold that the government bodies did not follow the relevant statutes. The other Connecticut case, *AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001), finds that a development plan was improperly adopted and then expressly declines to make any holding regarding the potential public use of eminent domain by finding the question moot. *Id.* at 303-04.

Respondents also argue that the Connecticut Supreme Court's approving citation of the Illinois Supreme Court's decision in *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC*, 768 N.E.2d 1 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (SWIDA), means that it is still possible for there to be some violation of the public use requirement. Brf. in Opp. at 17. As explained in the petition, however, under the reasoning of the majority opinion below, the condemnation in *SWIDA* would easily survive judicial scrutiny if it occurred in Connecticut. Petition at 13 n.7. The case did not turn, as Respondents would have it, on misconduct by government officials, but instead on the Illinois Supreme Court's rejection of economic development as a public use for purposes of condemnation. Acknowledging that the project would lead to revenue

expansion in the region, 768 N.E.2d at 6, 11, the *SWIDA* court nonetheless ruled that regional revenue growth was not sufficient to constitute a public use. *Id.* at 11 (rejecting "trickle down" economic benefits as a public use).

The majority of the Connecticut Supreme Court read this Court's decisions in *Berman* and, especially, *Midkiff*, as imposing no substantive limits on eminent domain authority under the U.S. Constitution's public use requirement. As set forth in the petition and in the *amicus curiae* brief filed by the Pacific Legal Foundation in this case, other courts have also interpreted these decisions as requiring no or very little protection to property owners facing very expansive uses of eminent domain authority. Moreover, the fact that different state supreme courts (and the majority and dissenting opinions in the instant case) have adopted vastly different and conflicting standards with regard to economic development condemnations suggests in the strongest possible terms the urgent need for this Court to provide direction. And with eminent domain now being used by governments simply to increase their tax base and improve their economies, the time is very ripe for this Court to reexamine the limits on eminent domain authority under the Fifth Amendment.

2. As Petitioner homeowners explain in their petition for certiorari, the analysis of state courts on the question of whether economic development alone constitutes a public use is all over the map. Petition at 10-21.

Respondents do not dispute that Petitioners have accurately identified the differing holdings and standards regarding whether economic development is a public use. Brf. in Opp. at 18. They also agree that Petitioners accurately identified the eight states that cite to the U.S.

Constitution or federal cases.[1] *Id.* at 20-21; *see Petition* at 10 n.3. Indeed Respondents' principal response to this confusion is to complain that even though these states do rely in part on federal law, they primarily interpret their state constitutions. Brf. in Opp. at 20-23 & n.6. Therefore, according to Respondents, this Court need not shed any light on the matter. To the contrary, a decision from this Court is desperately needed to provide guidance to states struggling with this issue.

Questions of public use are nearly always litigated in state court, because condemnees typically raise the defense of lack of public use after the government initiates a condemnation action in state court. Although Respondents grumble that the discussions of federal constitutional law by some of the state supreme courts are not particularly clear or thorough, the fact remains that at least seven states – Connecticut, Delaware, Florida, Illinois, Maryland, Montana, and North Dakota – rely in part on the federal constitution or case law in deciding whether economic development is a public use.[2] *See* Petition at 10 & n.3.

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[1] That number has now fallen to seven, after the Michigan Supreme Court decided *County of Wayne v. Hathcock*, No. 124070, 2004 Mich. LEXIS 1693 (Mich. July 20, 2004) solely under the Michigan Constitution.

[2] Respondents feel that a citation to the federal Takings Clause or federal caselaw is not enough to make the case one that interprets federal law if most of the discussion involves the state constitution. *See* Respondents' Brief at 20-22 & n.6. Certainly, it is possible that if the parties in those cases had appealed, this Court would have found that there were independent state constitutional grounds for the decision. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). But that is neither here nor there. The point is that some states think that the Takings Clause of the U.S. Constitution supports the use of eminent

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Respondents grudgingly admit that, even eliminating all the cases that Respondents think should be ignored because their discussion of the federal constitutional issue is too short, there is still a conflict between four states. Respondents flatly assert that four is simply too few to merit this Court's attention. Brf. in Opp. at 23. To Petitioner's knowledge, this Court has no requirement of a minimum number of conflicting states, and Respondents cite no authority to that effect. Certainly the Court has considered many important cases in which there was a conflict between fewer courts. *See, e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993) (2-1 split); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 695 (1995) (1-1 split).

Respondents also argue that the Illinois Supreme Court was incorrect in characterizing its holding that economic development is not a public use as a decision under federal law, because its decision conflicts with decisions of this Court. Brf. in Opp. at 22-23 n.7. In other

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domain for economic development and some think it does not. In particular, Respondents argue that Maryland and Florida do not rely on their interpretations of the U.S. Constitution. Brf. in Opp. at 20-21 n.6. In fact, while both Maryland and Florida primarily rely on state constitutional law, they also invoke federal law in support of their decisions. In *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278, 287 (Md. 1975), the Maryland Supreme Court relies in part on a prior Maryland Supreme Court public use decision that was decided under the U.S. Constitution, because that court treated the public use limitations in both constitutions as equivalent. In *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So.2d 451, 455 n.3 (Fla. 1975), the Florida Supreme Court cites to the Fourteenth Amendment for the proposition that eminent domain is "the means provided by the constitution for an assertion of the public interest and is predicated upon the proposition that the private property sought is for a necessary public use."

words, Respondents think the Illinois Supreme Court got it wrong. The fact that Respondents do not agree with the Illinois Supreme Court's interpretation of this Court's prior decisions is certainly a claim that Respondents may make if this Court grants the petition for certiorari. Petitioners also think that some of the state supreme courts have got it wrong, but Petitioners of course believe that it is the other states – the ones who find that economic development is a public use under the U.S. Constitution – that are incorrect. That is the dispute that Petitioners have asked this Court to resolve.

Petitioners also agree that few of the state supreme court cases have lengthy and comprehensive discussions of federal constitutional law, as distinct from state constitutional law. That is one reason why the case at bar is particularly appropriate for review by this Court. As Petitioners explained in their petition, Petition at 21-25, other cases have not presented the issue nearly as clearly or neatly.

Finally, even accepting all of Respondents' claims about the state supreme court decisions, this Court should still grant certiorari. This Court frequently considers important constitutional cases in which there is no split, but the Court addresses the interpretation and application of prior Supreme Court precedent. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994) (clarifying interpretation of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-39 (1997) (clarifying interpretation of prior Supreme Court ripeness precedents in regulatory takings cases). The main issue in the case at bar is how *Berman* and *Midkiff* should be applied to condemnations for economic development.

This Court also considers cases involving significant constitutional issues where there is substantial disagreement in state supreme courts about the proper interpretation of similar state, as well as federal, constitutional provisions. *See, e.g. Lawrence v. Texas*, 539 U.S. 558 (2003) (deciding constitutionality of state sodomy statute);[3] *Troxel v. Granville*, 530 U.S. 57 (2000) (deciding constitutionality of state statute pertaining to child visitation rights; other decisions included both state and federal constitutional construction);[4] *cf. BMW of North America, Inc. v. Gore*, 517 U.S. 559, 569-70 (1996) (deciding whether punitive damage award violated constitution and noting diversity of relevant state statutes and judicial decisions). The issue of eminent domain for economic development has a similar profusion of decisions under both state constitutions and the U.S. Constitution.

Confusion reigns in state courts regarding whether economic development is a public use under the U.S. Constitution (and under state constitutions as well).[5]

[3] The brief for the petitioner discusses the varying decisions from state supreme courts interpreting their state constitutions. *See* Brief of Petitioner on the Merits, Case No. 02-102, 2002 U.S. Briefs 102, *22-24 (Jan. 16, 2003) (available on Lexis).

[4] The dissent in the Washington Supreme Court discusses the decisions of numerous other states considering similar questions under both state and federal constitutional law. *See Smith v. Stilwell-Smith*, 969 P.2d 21, 36-38 (Wash. 1998) (Talmadge, J., concurring and dissenting).

[5] The confusion has deepened even since the filing of the petition for certiorari. As noted by the Respondents, the Michigan Supreme Court decided *County of Wayne v. Hathcock*, No. 124070, 2004 Mich. LEXIS 1693 (Mich. July 20, 2004). That case overturned the court's prior decision in *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981). *Poletown* was the first case upholding the use of eminent domain for economic development alone. Other state supreme

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Neither *Berman* nor *Midkiff* answers that question. As condemnations for private development proliferate throughout the country, state courts need to know the constitutional baseline beneath which condemnations may not fall. This case presents this Court with the opportunity to provide that much needed baseline.

CONCLUSION

This case raises a substantial question of national importance. It magnifies a split in authority and highlights the need for guidance from this Court on a fundamental constitutional issue. It does so in a manner that is hospitable to clear resolution by this Court. We respectfully urge this Honorable Court to address this issue of

courts, including the Connecticut Supreme Court in this case, have relied in part on the now-overturned *Poletown* decision in reaching their conclusion that economic development is a public use. *See Kelo v. New London*, 843 A.2d 500, 528 & n.39 (Conn. 2004) (App. 43-45). Indeed, the decision in *Hathcock* shows just how much of an outlier the Connecticut decision is. The Connecticut Supreme Court relied on *Poletown*'s holding that economic development could be a public use but then rejected even the slightly increased scrutiny adopted by the Michigan Supreme Court in *Poletown*, instead adopting a standard of nearly absolute deference. *See id.*

paramount public importance and to reaffirm a vital constitutional guarantee.

Respectfully submitted,

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